Supreme Court, U.S.
FILED
06-228 JUL 11 2006
OFFICE OF THE CLERK

No.....

In The
Supreme Court of the United States

.....◇.....

MAX CLAIN
Petitioner

v.

INTERNATIONAL STEEL GROUP
Respondent

.....

On Petition For Writ Of Certiorari
To The United States Court of Appeal
For the Second Circuit

.....

PETITION FOR WRIT OF CERTIORARI

.....

Max Clain
Pro Se
142 -01 41st Ave. # 714
Flushing, N.Y. 11355
(718) 539 - 1812

QUESTIONS PRESENTED

A private company from one state purchased the assets of a corporation from another State which at the time was in voluntary bankruptcy procedure .After receiving the purchased assets the buyer resold them for a huge profit but did not paid the contractual price for the purchase .

-1- Whether discarding the obligation of a Contract is unconstitutional within the meaning uf United States Constitution ?

-2- Whether a Court may ignore 11 U.S.C. 523 (a)(2)(A) and give to the buyer a discharge from the contractual debt ?

-3- Whether A Court may ignore a complaint,for remedy, against a buyer who did not pay his contractual debt ?

PARTIES TO THE PROCEEDINGS

Petitioner	**Max Clain Pro Se** **142-01 41st Ave. Apt. 714,** **Flushing, NY 11355.**
Respondent	**International Steel Group** **Counsel of Record** **Richard H. Engman** **Jones Day** **222 East 41st Street ,** **New York N.Y. 10017**

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Appendix -B- The Order of United States Court of Appeal for the Second Circuit -DENIED-my petition for rehearing.
Appendix -C Memorandum and Order of the District Court Southern District of New York .case 04 civ 173.
Appendix-D Form 8K submitted by Bethlehem Steel to SEC concerning International Steel Group bid for pur - chase of Bethlehem Steel assets .
Appendix -E Executive Order signed by President George W. Bush concerning the closing of the Federal Govern- ment on Friday December 26,2003 the day after Christmas .

JURISDICTION

The Memorandum and Order of the US District Court Southern District of New York was entered on January 31,2005. .The Summary Order of the US Court of Appeals for the Second Circuit was entered on Dec.01,2005. The Order - Denying -the petition for rehearing was entered on April 28 ,2006 .
Jurisdiction of this Court is invoked under 28 U.S.C. 1254

STATUTORY PROVISIONS INVOLVED

This case involved the following statutory provisions :

-Uniform Commercial Code 2 -301 : The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay according to the contract .
And :
11 U.S.C.-523 (a)(2)(A) Re{ Archer v. Warner (01-1418)

538 US 314 (2003) :A debt is not dischargeable in bankruptcy to the extend it is for money obtained by fraud .And

Bronson v. Kinzie 42 US 311 (1843) emphasize that nothing can be more material to the obligation of a contract than the means of enforcement .

STATEMENT OF THE CASE.

On January 09.2004 I submitted a complaint to US District Court ,Southern District of New York, pursuant to 28 U.S.C. 158 (a)(1) ,against International Steel Group (ISG).

ISG purchased Bethlehem Steel (BS) but after receiving BS assets did not paid the purchase price .

I owned BS 'preferred stocks and I requested to be compensated by the buyer from the unpaid amount of the purchase price.

ISG at the time of the purchase was a private company formed two years before by W.I.Rose &Co .a New York City buyout Co.

ISG main office was in Richfield , Ohio .W.I.Ross was also the chairman of ISG .

BS was a steel manufacturing American Corp .with main offices in Bethlehem ,Pennsylvania .

BS balance sheet listed approx. $ 6 Billion liabilities for pensions and health plan benefits for retirees and on Oct. 15,2001 filed for bankruptcy protection at U.S. Bankruptcy Court Southern District of New York .

On December 2002 Pension Benefit Guaranty Corp assumed BS pension plan and on March 2003 , the Bankruptcy Court cancelled BS' assumed health benefit liabilities.

After eliminating the liabilities for pensions and health benefits the remaining BS' liabilities for secured ,administrative and priorities claims were appr .. $ 750 Million.

At the time of ISG offer , BS' assets value as reported to SEC form 10 K on February 2003 , was $ 3.8787 Billion ($1.2632 Billion cash and cash equivalent and $ 2.6155 Billion fixed assets)..

On January ,2003 ISG made the offer to buy BS' assets for $ 1.5 billion .
On March 27,2003 The Bankruptcy Court signed an order establishing the bidding procedure for BS' assets.
On April 01, 2003 BS submitted to SEC the form 8K (001-01841) confirming ISG offer of $ 1.5 Billion (Appendix -D)
On April 23,2003 the Bankruptcy Court approved ,based on U.S.C. 363, the sale of BS' assets to ISG .
On May 07 took place the closing..BS delivered its assets(cash ,working capital, fixed assets.). in anticipation of payments from the buyer.

BS PLAN OF LIQUIDATION

On September 10 2003 BS submitted to Bankruptcy Court two documents. :
The Disclosure Statement for Debtors' Plan Of Liquidation and
Debtors' Plan of Liquidation under chapter 11 of the Bankruptcy Code..
The Disclosure Plan of Liquidation provide a distribution of only $ 30.4 Million in cash for secured and administrative claims and $ 15 Million in ISG stock class B for unsecured claims, a total of $ 45.4 Million which represent only 3 % of the purchase price The remaining balance..97% ($ 1.4546 Billion) presumably to be distributed direct by the buyer to creditors.. It was not.
The Disclosure Plan of Liquidation- reports that ISG paid directly to creditors cash or otherwise $ 736 Million .
From the purchase price of $ 1.5 Billion remained a huge

amount undistributed .
At the time when BS' Plan of Liquidation was submitted BS no longer existed .

B.S assets were already transferred to ISG four months before, BS' Board of Directors was eliminated and BS' management became ISG employees. No one was in charge to verify the payments and distribution conform 11 U.S./C. 1129 7 (A)(ii) and 11 U.S.C. 726 .
Practically, when the Plan of Liquidation. was submitted BS was only a mask behind which stood ISG ,and facts proved that the Plan of Liquidation was only a formality needed by ISG to obtain a discharge for the unpaid purchase price.
On October 22,2003 ,the Bankruptcy Court approved BS' Plan of Liquidation and less than 9 months later Mr.Ross who masterminded the purchase of BS sold it to Mr.. Laksamy Mittal for approx. $ 4.5 billion .In an interview published by New York Magazine on Nov. 08 ,2004 Mr. W Ross referring to the purchase and resale of BS said : **"It's nice to make 14 times (1400% mc) your initial investment in just 2 years ."**

On December 23, 2003 the Bankruptcy Court overruled my claim for the preferred stocks which I own It was logic. .As I wrote above , BS' plan of liquidation provided distribution of only 3% of the purchase price .My claim should have been addressed to the people in charge with the distribution of the full amount of the purchase price . In an ironical way this was the buyer itself .

Consequently , on January 09,2004 I submitted my complaint to the District Court. claiming that because ISG did not pay the contractual price, a legal distribution from the proceed of selling BS' assets did not materialized .

STATEMENT OF FACTS

I wrote in my complain to the District Court :

"- I owm in two accounts with Fidelity Investment ,IRS and WROS preferred stocks with a total face value of 10.5 Million .Since ISG did not pay hundreds of million dollars which were part of the bid for the acquisition of BS' assets illegally sequestrated the property and equipment of BS in which I still have an equitable right. I request to have my rights reinstated by ISG in the property acquired from BS or to be compensated in cash ".

In the brief submitted to the Second Circuit Court of Appeal I wrote :

"Pursuant to Uniform Commercial Code in a purchase transaction the obligation between seller and buyer are :

2-328 (b) Sale by auction is complete when seller accept the purchase offer of the buyer ,

2-301 -The obligation of the sellers is to transfer and deliver and that of the buyer is to accept and pay according to the contract.

In refernce to my right to make a complaint against the buyer ,ISG, Uniform Commercial Code definition are:

2-707 (1) define a person in a position of a :seller: A person who hold a security interest or other rights in goods, similar with that of the sellers. And

2-709(1) "when the buyer fails to pay the price the seller may recover .the price.

THE PURCHASE AGREEMENT

The purchase agreement signed between BS and ISG specified 2 forms of compensation by the buyer .Art.2 sect

2.1 reads .The aggregate consideration for the sale anf the transfer of the acquired assets will be :

-1- In the form prvided in section 2.2 , $ 955 Million cash and -2-assumed liabilities by the buyer (section 1.3 b reads : -" All liabilities and obligations arising after the Closing related to the Acquired Assets."). And section 3.4 par.-f- .reads :"If the working capital delivered by the seller is equal or greater than $ 981 Million no adjustment shell be made to the purchase price ."BS' working capital as reported to SEC on Feb.04,2001 was $ 1.263 Billion which was 282 Billion above BS contractual obligation. ISG did not dispute receiving it .

WHAT ISG PAID

In the brief submitted to Second Circuit Court of Appeal the counsel for ISG wrote (pages 4-5) :

> -" Under the purchase agreement ISG acquired substantially all Bethlehem assets, in exchange for the assumption of certain specified liabilities and $ 955 Million in cash or such a lesser amount as will be required to satisfy all secured, administrative and priority claims against Bethlehem

The paragraph ,made clear that the buyer did not pay nor intended to pay the full amount of BS purchase .The last part of the paragraph written by . by ISG counselor-"or lesser amount" is a denial of paragraph 3.4 (f) of the Purchase Agreement ,of the bid and of the contractual obligations as a whole .

United State Supreme Court wrote approx. 200 years ago, Re Fletcher v. Peak 10 US 87 (1810)

> -" A party to a contract cannot pronounce its own deed invalid."

The counselor for ISG wrote : :"ISG paid to BS or secured creditors (directly mc) $) 736 Million plus $120 Million later.
Subtracting $ 41.1 Million which ISG took back from the payments ,as recorded byISG form 10 K submitted to SEC for the year 2003,result a difference of unpaid cash :
955-(736 +120 -41) = $ 140 Million.
considering the bid value ,which includes assumed liabilities, result unpaid difference from the purchase price of 1500 -(955 -140) = $ 685 Million unpaid by the buyer.
I have to stress that those payments are based 0n ISG figures and comparing them with other sources , including Mr.Ross own statement, they are dubiously inflated.

United States Supreme Court in the decision -Archer v. Warner (01-1418) 538 US 314 (2003)Certiorari to the United States Court of Appeal for the Fourth Circuit : :
-" A debt is not dischargeable in Bankruptcy to the extend it is for money obtained by fraud 11 US code-523 (a)(2)(A)
And
-+The Court noted that a change in the Bankruptcy Code 'non- dischargeability provision indicates that the Congress intended the fullest possible inquiry to ensure that all debt arising out of fraud are excepted from discharge " .

COURTS' DECISIONS

Following the decision of the Bankruptcy Court on Dec .23,2003 disallowing my claims ,I submitted on Jan .09 2004 a complaint at the United States District Court ,Southern District of New York -case 04 civ 173.A year later on January 31 ,,2005 the Magistrate Judge wrote a Memorandum and Order (Appendix -C-) dismissing my complaint for two reasons .:

-1- Lack of jurisdiction Federal Rules of Civil Procedure 12 (b)(1) .

-2-Failure to state a claim on which relief may be granted federal rules of civil Procedure !2(b)(6) .In reference to the lack of jurisdiction the Magistrate Judge wrote :

> -"In the case at bar Clain has not filled a notice of appeal as required by Fed.R.Bankr .Pr. 8001. Moreover more than 10 days have elapsed as required by Fed.R Bankr.P. 8002 since the entry of the order of the Bankruptcy Court ,Clain seeks to appeal. Accordingly the court lacks jurisdiction to entertain an appeal .

In reference to failure to state a claim The Magistrate Judge wrote :

> -"In bankruptcy cases a court may enjoin a creditor from: suing a third party, provided the injunction play an important part in the Debtor ,reorganization plan. In Re ::Drexel -Burnham Lambert Group. Inc. 960 F 2d 285 (2nd Circuit 1992) .Since Clain was enjoined from bringing this action he has not stated a claim upon which relief may be granted. That part of the instant action not already dismissed for lack of subject matter jurisdiction must be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) .".

I disagreed with the decision of the district court ,both factual and legal and on Feb.04,2005 I submitted a Notice of Appeal to the U S court of Appeal forv the Second Circuit (case 05civ 1315. On Dec. 05, 2005 US Court of Appeal issued a summary Order AFFIRMING the decision of the District Court (Appendix -A-).On December 14 ,2005 I submitted a petition for rehearing . On April 28, 2006 the Court of Appeal denied my petition for rehearing (Appendix -B-)

RE: TIMING OF MY COMPLAINT

From December 23,2003 to January 09 ,2004 (rule 8002) Federal Rules of Civil Procedure, Rule 6 time computation, reads :

-"When the period of time prescribed or allowed is less than 11 days , Intermediate Saturdays, Sundays and legal holidays shell be excluded in the computation ,and any other days appointed as a holiday by the President or the Congress of the United States or by the state in which the District court is held ". AND

-"The day of the act ,event or default from which the designated period of time begin to run shell not be included. The last day of the period of time so computed shall be included.

TIME COMPUTATION

Days should be counted	Days should not be counted
	Dec .23,2003 -the day of the act not to counted
Dec.24.2003	
	Dec.25,2003 Christmas Dec.26 ,2003 Federal holiday signed by US President (Appendix-E) Dec 27,2003 Saturday Dec.28 ,2003 Sunday
Dec.29,2003 Dec.30,2003 Dec.31,2003	
	Jan. 01,2004 -New Year
Jan 02,2004	
	Jan,03 2004 Saturday

Jan,04 2004 Sunday

Jan.05,2004
Jan.06 .2004
Jan.07,2004
Jan,08 2004
Jan.09,2009

Total 10 days
I could not believe, God forgive ,that Magistrate Judge and 2nd Circuit Court of Appeal does not know Fed. Rule Civ. Pr. rule 6 ,time computation ;And I do not understand why the suggestion of defendant's counsel was enough to disregard it

THE FORM OF THE COMPLAINT
Rule 8001

The Bankruptcy Rule 8001 Appeal as of right ,reads :
The notice of appeal shall :

-1- **Conform substantially** to the appropriate official form
-2-Contain the name of all parties to the judgment, order or decree and the names ,addresses and telephone number of their respective attorneys, and
-3-be accompanied by the prescribed fee. Each appellant shell file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with rule 8004.

My appeal to the District Court satisfied all of the above requirements of the rule -8001- except that I did not write the name of the defendant attorney because ISG did not have an attorney named in the case. Instead I wrote in my complaint the address of the defendant and served it to the president and the legal department of the defendant. Consequently ,I satisfied Rule 8001. ..

I WANT TO STRESS THAT MY COMPLAIN WAS NOT AGAINST BANKRUPTCY COURT DISTRIBUTION OF THE PURCHASE PRICE ,BECAUSE BANKRUPTCY COURT DID NOT DISTRIBUTED THE PURCHASE PRICE,BUT AGAINST THE BUYER WHO DID NOT PAY THE PURCHASE PRICE AND USED THE BANK-RUPTCY COURT ONLY TO OBTAIN A DISCHARGE OF THE PURCHASE PRICE FROM WHICH THE DISTRIBUTION SHOULD HAVE BEEN MADE
MY COMPLAINT WAS BASED ON UNIFORM COMMERCIAL CODE ,-CONTRACTS- AND UNDER THE CIRCUMSTANCES WAS A PROBLEM OF INTERSTATE COMMERCE .
NEVERTHELESS MY COMPLAINT SATISFIED ALSO BANKRUPTCY RULES 8001,8002, AND 8004.

FAILURE TO STATE A CLAIM

The Court of Appeal for the Second Circuit AFFIRM the the decision of the District Court pursuant to Fed. R. Civil. Pr. 12 (b)(6) based on the case, Drexel ,Burnham ,Lambert Group Inc. 960 F.2d 285 (2nd circuit 1992) and wrote :

> -" In Bankruptcy cases a court may enjoin a creditor from suing a third party ,provided the injunctition plays an important part in the debtor's reorganization plan ."

In citation the- Drexel case- the Court bypass my complaint which was about -Contracts - and the corresponding laws. Using -Drexel -case without careful examination of the Drexel case and the circumstances of the case , and making a confusion between the words reorganization and selling of assets lead to abuses of discretion ,which disregard U.S.C. entirely .. .

There are four errors ,which made the-Drexel Case - an incomprehensible reference to my case..

First The sentence from Drexel case (written above) which the Court of Appeal found that justify permanent injunction against BS' equity owners is part of a paragraph (page 9, par. 9) in Drexel case from which the second sentence was eliminated .The second sentence reads :

> "the injunction is a key component of the settlement agreement ."

Indeed a settlement agreement was previously approved and the meaning of- Drexel case - was the court decision to enforce the settlement and to stop a litigation intended to reopen it. According to the settlement in the Drexel case the creditors received 57% of their claims. and were not expunged. By truncating a paragraph in a citation and changing its meaning ,any law in the country may be eliminated by discretionary disposition.

Second Drexel was a case of class action for injuries (financial) resulted from illegal transaction in -Junk Bonds- by the team of M. Milken and Boesky. Exemples of similar cases of class action , for injuries on which the -Drexel -was based are :

John Manville Corp. 843 F.2c636.9(2nd Circuit 1988)for asbestos injuries and Menard -Sanford (In Re :A.H.Robins Co .) injuries for defective Dalkon Shield .

The Drexel case and the cases on which Drexel was based have been found appropriate only in extraordinary cases were creditors who were enjoined from suing third parties were offered substantial consideration from the third parties which were released from liability ..

Anyway, Drexel cannot be a justification to eliminate the contractual debt of a buyer, and when the contract was broken to deny the right to sue in Court, the defendant for remedy Re: Bronson v Kinzie 42 US 311 (1843) .

Third The Drexel case was not a bankruptcy case .BS was not a reorganization case and ISG was a buyer and not a third party. Based on 28 U.S.C.-157 (d) the Court with - drew - Drexel- from the bankruptcy court and judged it as an interstate commerce case.. My case was a contract case wrapped in interstate commerce legislation .It cannot be ignored the existing adequate remedies at law, and it was an abuse of discretion to assimilate a contract case (mine) as a bankruptcy case based on a case Drexel which was not a bankruptcy case ,BS was liquidated and sold to ISG based on a price offered by ISG ,a contract signed by ISG ,a bid offered by ISG and resold by ISG almost instantateous for a huge profit in a global market hungry to buy.What ISG did not do was to pay for the purchase ..US Supreme Courtin the case Fletcher v.Peck10 US 87 (1810) wrote :

> -" A law annulling conveyances is unconstitutional because is a law impairing the obligation of contracts within the meaning of the constitution of the U.S.

Fourth Even let suppose that ISG a buyer is considered a third party in BS' liquidation. Fed..R. Civ. PR. rule 14 reads :

> The plaintiff may assert any claims against the third party defendant arising out of the transaction or occurrence that is subject matter of the plaintiff .claims ..

Second Circuit Court of Appeal concludes to the effect that:

-1-Whatever the buyer said that they paid ,they paid enough (In original -substantial.-).

2- ISG by not paying the contracted debt (in original non debtor release) played an important role in consummating the debtor's chapter 11 liquidation,

Therefore it is enforceable against Clain ..

Such sentences are neither literally logic nor juridical justified .By implication. omitting the word -Contract. and

again, equaling the word reorganization- and the words -Purchase of Assets , they offered a protection for a fraud perpetrated by the buyer and create a precedent which replace the rule of -law- with the rule of - anything goes-..

CONCLUSIONS

Since the inception of life on our planet ,people of every culture, race or religion fought to defend a law, which is also known by many as the 8th Commandment .-Do not steal .-In a time when for some people, cheating the equity owners has became a fashionable way of doing business, the transaction between ISG and BS was conducted in a way which disregarded , the history ,the laws and the judicial philosophy ,which are the main-reason d'etre-of civilization in our country

Second Circuit Court of Appeal denying ,based (as I showed above),on false arguments)my request tu sue the buyer for remedy against a fraud ignored decisions of this Court and disregarded US Constitution Article 1 Section 10 obligations of Contracts and Amendment XIV depriving me of the property without due process . .

The 4th Chief Justice of United States John Marshall wrote :

> "The question whether an act repugnant to the Constitution can became the law of the land is a question of deep interest to US.

Considering all the facts ,I respectfully ask this court to grant my petition seeking a writ of certiorari.

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Appendix-A-

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT, IN A SUBSEQUENT STAGE OF THIS CASE,IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

_At a stated term of the United States Court of Appeal for the Second Circuit. held at the Thurgood Marshall United States Courthouse ,Foley Square in the City of New York on the 1st day of December, two thousand and five.

PRESENT ::

Hon. James L .Oakes ----------
Hon. Chester J. Straub Filed
Hon. Reena Raggi Circuit Judges Dec 01,2005

-MAX CLAIN SUMMARY ORDER
Plaintiff -Appellant No. 05- 1315-cv
v.
INTERNATIONAL STEEL GROUP
Defendant -Appellee,

Appearing for Plaintiff- appellant Max Clain pro -se
Flushing, NY
Appearing for Defendant-Appellee RICHARD ENGMAN\
Jones Day ,NY,NY

-Appeal from a final decision of the United States District Court for the Southern District of New York(Kevin Nathaniel Fox ,Magistrate Judge).

Clain v .Int[l Steel Group
No 05-1315 -cv
AFTER ARGUMENT AND UPON DUE CONSIDE-\RATION IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is AFFIRMED

Plaintiff -Appellant Mac Clain ("Clain") appeal from a judgment of the District Court of the Southern district of New York(Kevin Nathaniel Fox,Magistrate Judge)* dismissing his complaint pursuant to Federal Rule of Civil Procedure 12 (b)(6) .This case arises out of the chapter 11 filing and subsequent liquidation of the Bethlehem Steel Corporation and related corporation (collectively "Bethlehem Steel" or the ""Debtor")/ Bethlehem Steel filed a chapter 11 petition in Bankruptcy Court for the Southern District of New York on October 15,2001. Clain filed an unliquidated claim in the Bankruptcy Court to which the debtor objected . Clain filed a response to the debtor's objection and on December 23, 2003 the Bankruptcy Court disallowed Clain claim . Clain did not file a notice of appeal of the Bankruptcy Court's order disallowing his claim.

On April 23 ,2003 the Bankruptcy Court approved Bethlehem Steel's request to approve the sale of the majority of its assets to the Defendant-Appellee International Steel Group ("ISG') .The order approving the sale provided, inter alia ,that "equity security holder...are forever barred ,estopped and permanently enjoined from asserting against ISG... such person's or entities ' Interests." On October 2 2,2003 the Bankruptcy Court approved the Debtor's .

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*This matter was originally assigned to Hon.Richard M . Bergman On Marcg30,2004 Clain consented to have the matter heard by a magistrate judge.The case was then assigned to Hon.Kevin Nathaniel Fox

chapter 11 plan of liquidation , which cancelled all pre-petition equity interest in the Debtor. The plan of liquidation is binding on all holders of claims and equity interest. . On January 9,2004 ,Clain filed a complaint in the Southern District of New York challenging the Bankruptcy Court's order disallowing his claims and the extinguishment of his rights as a former holder of preferred shares in Bethlehem Steel Corporation . On January 31 ,2005 the Magistrate Judge granted ISG' motion to dismiss pursuant to Federal Rule of civil Procedure 12 (b)(1) and 12 (b)(6).
The Magistrate Judge held that the District Court lacked subject matter jurisdiction because Clain had not filed a timely notice of appeal of either the Bankruptcy Court order disallowing his claim or the order approving confirmation of the plan of liquidation . The Magistrate Judge also held that Clain failed to state a cause of action because he was enjoined from bringing the action by operation of the order of Bankruptcy Court approving the ISG purchase of Bethlehem's assets.

A District Court has jurisdiction to hear appeal from a Bankruptcy Court under 28 U.S.C. 158 (a)(1) only if the appellant files a timely notice of appeal .In re :Siemon 421 F.3d 167 ,169 (2nd cir.2005)(per curiam)("In the absence of a timely notice of appeal in the district court ,the district court is without jurisdiction to consider the appeal, regardless of whether the appellant can demonstrate excusable neglect."(Internal quotation marks omitted) The District Court correctly held that it was without jurisdiction to hear the matter due to Clain's failure to file a timely notice of appeal.

Although the complaint only stated U.S.C. 158 as the bases for the district court's jurisdiction Clain now asserts the 28 U.S.C. 1331-1332 provide jurisdiction .

Even assuming that jurisdiction was proper, that District Court was correct that the complaint must be dismissed pursuant to Federal Rule Civil Proicedure 12 (b)(6) "In bankruptcy cases,a court may enjoin a creditor from suing a third party, provided the injunction plays an important part, in the debtor's reorganization plan ".In re:Drexel Burnham Lambert Group.Inc 960F.2d 285,293 (2nd Cir.1992).
Although these " nondebtor releases"are proper only in rare cases they have been approved where the estate received substantial consideration .In re :Metromedia Fiber Network, Inc 416 F.3d 136,141-42 (2nd Cir.2005) In this case the sale of Bethlehem's assets was essential to the plan of liquidation Indeed the Bankruptcy Court held that the sale was "a prerequisite to the Debtor's ability to confirm and consummate a chapter 11 plan ". ISG provided substantial consideration to the estate in the form of,inter alia, $736,630,296 in cash. As the nondebtor release played an important ro;e in consummating the Debtor's chapter 11 liquidation, it is enforceable against Clain .Accordingly,,he is barred from collateally attacking the adverse Bankruptcy Court's ruling.

For the forgoing reason, the judgment of the istrict Court is hereby AFFIRMED..

FOR THE COURT
ROSEANN B. MACKECHNIE ,CLERK

-By /S/ Lucille Carr

APPENDIX -B-

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT-HOUSE
40 FOLEY SQUARE NEW YORK 10007
Roseann B.MacKeckechnie
CLERK
Docket Number 05-1315-cv
Short title Clain v, International Steel Group
DC Docket Number 04-cv-173
DC Judge Honorable Kevin Fox.

At a state Term of the United States Court of Appeal for the Second Circuit ,held at the Thurgood Marshall United States Courthouse, Foley Square in the city of New Yotk on the 28 day of April two thousand six .

Present :
Hon. James L.Oakes
Hon.Chester H. Straub
Hon .Reena Raggi
CIRCUIT JUDGES

FILED
April 28,2006

Clain v. INTERNATIONAL STEEL GROUP
A petition for panel rehearing having been filed herein by Max Clain. Upon consideration thereof ,it is Ordered that said petition be and hereby is **DENIED**

FOR THE COURT
ROSEANN B.MACKECHNIE, CLERK

By /S/ Arthur .Heller

Motion Staff Attorney

Appendix -C-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAX CLAIN <

Plaintiff, Memorandum and
- against - Order
04- Civ-173(KNF)

INTERNATIONAL STEEL GROUP
Defendant

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

-1- INTRODUCTION

Plaintiff Max Clain ('Clain") commenced the instant action, pro se, seeking to appeal pursuant to 28 U.S.C.158 (a)(1) or to enforce certain orders that the United States Bankruptcy Court for this judicial district ("bankruptcy court ") issued in connection with several bankruptcy action filed by filled by Bethlehem Steel Corporation and other related corporate entities (collectively, "Bethlehem"). Defendant International Steel Group ("ISG")and other entities -not parties to the instant action, acquired substantially all the assets of Bethlehem in a sale approved bt the bankruptcy court . Before the Court is a motion by iSG to dismiss Clain's complaint pursuant to Fed.R.Civ. P. 12(b)(6). Clain opposes the motion.

For the reason discussed below , part of the complaint is dismissed for lack of subject matter jurisdiction ,and ISG's motion to dismiss *is granted with respect to the balance of the* complaint.

II BACKGROUND AND FACTS

On October 15,2001 Bethlehem filed several petitions in the bankruptcy court for this judicial district pursuant to chapter 11 of the United states Bankruptcy code,11 U.S.C 101,et seq. On April 23,2003, the bankruptcy court issued an order ("Sale Order") that inter alia ,approved the sale of substantially all of Bethlehem's assets to ISG and other entities affiliated with it. With exception not here pertinent the Sale Order "forever bar(s) estop(s) and permanently enjoin(s)" all persons and entities, including holders of debt securities and equity securities in Bethlehem, from bringing any action against ISG. See in re:Bethlehem Steel Corporation, at al.. 01-15288 through 01-15302 ,01-15308 ,through 01 15315 ,Sale Order at 8,33,34 Bank.S.D.N.Y , April 23 2003 (BRL). By order of the bankruptcy court ,dated October 22,2003 ("Confirmation Order ") all equity interest in Bethlehem were canceled. See In re : Bethlehem Steel Corporation at al...Confirmation Order at 56. Clain who alleges that he held an equity interest in Bethlehem,filed a proof of claim with the bankruptcy court.In an order dated December 23 ,2003 ("Claim Order") the bankruptcy court disallowed and expunged clain's proof of claim in its entirety. See In re: Bethlehem Steel Corporation at al... Clain order at p.3 Clain filed the instant action against ISG ,seeking to appeal the Confirmation Order and the Claim Order, pursuant to 28 U.S.C. 158 (a)(1).Clain also contends that ISG has not fulfilled its obligation under the Sale Order, and seeks enforcement of that order..

ISG contends , inter alia ,that the instant action should be

dismissed because Clain is enjoined by the Sale Order from prosecuting this action against ISG..

III . DISCUSSION

Subject Matter Jurisdiction

Before reaching the merits of ISG"s Motion ,the Cour mustt determine whether it has subject matter jurisdiction over this action ."It is axiomatic that federal court are courts of limited jurisdiction and may not decide cases over which they lack subject matter jurisdiction ,Lyndonville Savings Bank & Trust Co. v.Lussier 211 F.3d 697.700 (2nd Circuit 2000)" Failure of subject matter jurisdiction .. is not waivable and may be raised at any time by a party or by the court sua sponte "Oscar Gruss &Son Inc.v, Hollander 337F.3d 186,193 (2nd Cir.2003) .Indeed ,the Federal Rules of Civil Procedure require that a court dismiss an action sua sponte if it appear that the court lacks subject matter jurisdiction . .See Fed. R.Civil P. 12 (h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.")

A district court has jurisdiction to hear appeals from final judgment, order ,and decree of the bankruptcy court See 28 U.S.C. 158(a)(1) .However the the Federal ruules of Bankruptcy procedure provide certain procedural requirements that, if not met deprive a court of jurisdiction to hear an appeal .In pertinent part,the Federal Rules of Bankruptcy Procedure provide :

Rule 8001. Manner of Taking.Appeal Voluntary Dismissal :

-a-Appeal as of right; how taken

An appeal from a judgment ,order ,or decree of a bankruptcy judge to a district court or bankruptcy

appelate panel as permitted by 28 U.S.C.158 (a)(1) or (a)(2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002.

Rule 8002. Time for filing Notice of Appeal .
-a-Ten days period

The notice of appeal shall be filed with the clerk with*in ten days of the date of the entry of the judgment ,order or decree* appealed from..
..Fed.R. Bank.P. 8001(a) ,8002 (a)

"Failure to file the notice of appeal within the ten days period is strictly enforced ,and the deadline is jurisdictional in nature". In re:Deutsh -Sokol 290 B.R 27 29 - 30 (S.D.N.Y2003) see also Twin Roller Rink Joint Venture, 70 BR 308,310 (S.D.N.Y. 1987) ("Failure to file a timely notice of appeal within the meaning of Bankruptcy Rule 8002 bars appellate review ") .

In the case at bar,Clain has not filed a notice of appeal, as required by Fed.R.Bank.P.8001.Moreover, more than ten days have elapsed since the entry of the order of the bankruptcy court that Clain seeks to appeal. Accordingly the court lacks jurisdiction to entertain an appeal, and those parts of the instant action that seeks to appeal orders of the bankruptcy court must be dismissed..

Motions to Dismiss

A court may dismiss an action, pursuant to Fed.R.Civ.P. 12 (b)(6) . for failure to state a claim upon which relief can be granted ,only if "it appear beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief" Jaghory v.New York State Dept. of Education 131 F.3d 326, 329 (2nd Cir. 1997) .In considering a motion made pursuant to this rule "the court must accept all factual allegations in the

complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff ".Id A court may also consider all paper and exhibits appended to the complaint, as well as any matter of which judicial notice may be taken. See Hirch v, Arthur Anderson & Co .72 F.3d 1085,1092 (2nd Cir 1995). When considering a motion to dismiss ,a court may take judicial notice of the order of another court. See,e.g.Steinmetz v. Toyota Motor Credit Corp 963 F.Supp. 1294,1299 (E.D.N.Y. 1997) Furthermore, in a case such as this in which the plaintiff is pro se pleading :are (to be) held to less stringent standard than formal pleading drafted by lawyers ." Hughes v.Rowe 449 U.S. 5,9,101 S.Ct 173,176
(1980) (quoting Haines v .Kerner 404US 519,520 92.S Ct 594,595 (1972).

"In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan." In re:Drexel Burnham
Laambert Group Inc.960 F.2d 285 293 (2nd Cir.1992);In re; Ionosphere Clubs Inc.960 184 B.R. 648,655, (S.D.N.Y. 1995)
citing in re Drexel Burnham Lambert Group Inc. 960 F.2dat 292) (anti-suit injunction against creditors may be necessary "in order to resolve finally all claims in connection with the estate and to give finality to a reorganization plan")..In the case at bar,
the bankruptcy court has enjoined Clain from bringing against ISG any action arising out of his status as a creditor of Bethlehem .A review of the Sale Order makes it clear that the
injunction play an important part in Bethlehem' reorganization plan .Accordingly ,the injunction is enforceable.
As Clain is enjoined from bringing this action, he has not

statead a claims upon which relief may be granted. That part of the instant action not already dismissed for lack of subject matter jurisdiction must be dismissed pursuant to Fed.R Civ.P 12(b)(6)

IV CONCLUSION

For the reasons set forth above, those parts of the instant action that seek to appeal orders of the bankruptcy court are dismissed for lack of subject matter jurisdiction , and the remainder of the complaint is d*ismissed for failure to state a claim upon which relief may be granted*.

SO ORDEREDE

Dated New York , New York / */s/Kevin Nathaniel Fox*
January 31 ,2005

United States Magistrate Judge

Copies mailed to

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APPENDIX -D-

Bethlehem Steel Corporation
Corporate communications division
Public affairs Department
1170 Eight Avenue
Bethlehem, PA 18016-7699

Form 8 K submitted to SEC on April 01,2003

FOR IMMEDIATE RELEASE

JUDGE ESTABLISHES SALE PROCEDURES FOR BETHLEHEM'S STEEL ASSETS.

BETHLEHEM, PA, March 31, 2003- The Honorable Burton Lifland of the U.S. Bankruptcy Court for the Southern District of New York has adopted sale procedure governing the sale by Bethlehem Steel Corporation of substantially all of its assets to International Steel Group Inc. (ISG)

The ISG offer of $1.5 Billion is subject to a higher or better bid.The judge ordered that an auction will be conducted on April 16.A sale hearing tp approve either ISG bid or a higher or better bid will be held on April 22.

The judge also approved the following requirement for a qualified competing bid :

An offer for Bethlehem of at least $15 Million more than the ISG offer.

A break up fee of $ 27 Million in cash payable to ISG.

A cash payment to ISG of up to $ 5 Million for reinbursement of its out of pocket expenses ..

If approved on April 22,the sale to ISG is expected to be completed on the second quarter of 2003 .

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APPENDIX -E-

Office of Personnel Management

The Federal Government's Human Resources Agency

THE WHITE HOUSE

Office of the Press secretary

For immediate Release December 09.2003

EXECUTIVE ORDER

CLOSING OF EXECUTIVE DEPARTMENTS AND AGENCIES OF THE FEDERAL GOVERNMENT ON FRIDAY DECEMBER 26 ,2003.

by the authority vested in me as President by the Constitution and the laws of the United States of America,it is hereby ordered as follows :

Section -1- All executive branch department and agencies of the Federal Government shall be closed and their employees excused from duty on Friday ,December 26,2003, the day after Christmas Day ,except as provided in section 2 below .

Section -2-.The heads of executive branch departments and agencies may determine that certain offices and installations of their organization, or parts thereof ,must remain open and that certain employees must report for duty on December 26, 2003,for reason of national security or defense or other public need..

Section -3- Friday ,December 26 2003 shall be considered as

falling within he scope of Executive Order 11582 of February 11,1971 and of 5 U.S.C. 5546 and 6103 (b) and other similar statutes insofar as they relate to pay and leave of employees of the United States.

GEORGE W.BUSH
THE WHITE HOUSE
December 9,2003
Office of Personnel Management
1900 E.Street NW,, Washington ,DC 20415-1000
(202)606-1800